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NO. 87-841

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF MISSISSIPPI,

Petitioner

vs.

DANNY RAY DAVIS,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MISSISSIPPI SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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Respondent respectfully requests that this Court deny the petition of writ of certiorari.

CASE HISTORY

The Respondent, Danny Ray Davis, was indicted by the grand jury of Tate County, Mississippi for capital murder. On October 9, 1985, the trial court heard numerous motions by defense counsel, including a motion for a change of venue. One of the witnesses for the State in opposition to the venue motion was Ben Delap. Approximately four weeks later, the jury selection began and, as it turned out, Mr. Delap was part of the venire. Defense counsel, not recognizing Mr. Delap as a former State witness, asserted no challenge for cause and ultimately Mr. Delap was chosen as a member of the petit jury. After the

jury selection but prior to opening statements, defense counsel learned that Juror Delap has previously testified for the State. (This fact was admittedly known by the prosecutors throughout the jury selection process but was never brought to the court's attention.) Defense counsel moved that the entire panel be stricken and that a mistrial be declared. The motion was overruled. Defense counsel then moved that Juror Delap be stricken and an alternate substituted. This motion was also denied, even though three alternate jurors were available. (See appendix A 4-5)

The Respondent was convicted. During the sentencing phase of the trial, the prosecution introduced a prior conviction of the Respondent as an

aggravating factor. In mitigation, the defense counsel sought to introduce the sentencing order from the prior conviction. This evidence, disallowed by the trial court, would have established that the Respondent had already received a sentence of twenty years for the prior conviction. (Appendix A-7)

The Respondent instituted an appeal to the Mississippi Supreme Court, and on September 23, 1987, it ruled that Mr. Delap's service on the jury panel denied the Respondent his right to a fair and impartial jury. The Mississippi Supreme Court also reversed the trial court for not allowing the introduction of the sentencing order from the prior conviction.

CERTIORARI SHOULD NOT BE GRANTED

Petitioner presents the following questions for the Court's review:

1. Whether it is a violation of the Sixth Amendment to the Constitution to allow a person who previously testified on behalf of the State at a change of venue hearing to serve as a member of the petit jury where there is no showing or attempt to show actual bias on the part of the juror?

2. Whether this Court's prior decisions require that a defendant in a capital case be allowed to tell the jury in mitigation what sentence he received for a prior conviction which the State has used as an aggravating factor.

The Respondent respectfully submits that the questions presented by the Petitioner are not properly subject to review by the United States Supreme

Court. It is well settled that a state may afford greater protections for the individual than those guaranteed by federal law or by the laws of another state. "The Supremacy Clause proscribes what a state may do with its own constitution only where the state would afford the individual lesser rights and protections than does the U.S. Constitution." Stringer v. State, 491 So. 2d 837, 847 (Miss. 1986) citing Michigan v. Long, 463 U.S. 1032, 1037, 1040, 103 S. Ct. 3469, 3474, 3476, 77 L. Ed. 2d 1201, 1212, 1214-15 (1983); Connecticut v. Johnson, 460 U.S. 73, 81 n. 9, 103 S. Ct. 969, 974 n.9, 74 L. Ed. 2d 823, 830 n.9 (1983); Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81, 100 S. Ct. 2035, 2040-41, 64 L. Ed. 2d 741, 752 (1980); Gertz v. Robert

Welch, Inc., 418 U.S. 323, 346-47, 94 S. Ct. 2997, 3010, 41 L. Ed. 2d 789, 809 (1974).

With respect to the juror issue, the Mississippi Supreme Court relied on a prior Mississippi decision for its proposition that a jury should not be "infected by ...the slightest taint or suggestion of bias or unfairness." (Appendix A-6 citing Fisher v. State, 481 So. 2d 203, 216 (Miss. 1985)). In this regard, other state courts have indeed afforded lesser protections to the criminally accused (See e.g., Singer v. State, 109 So. 2d 7, 18 (Fla. 1959), but the decision of the Mississippi Supreme Court is the final authority on questions of Mississippi Constitutional law and in Mississippi "[a] trial before a jury, one of whose members has been a

witness for the prosecution in a pretrial hearing, is by definition, not a fair trial." [Appendix A-7].

With respect to the issue of mitigating factors in the sentencing phase of capital murder cases, this Court has consistently held that the defendant must be allowed to present any relevant evidence that might cause the jury to decline the imposition of the death sentence. McCleskey v. Kemp, U.S. , 107 S. Ct. 1756, 1773, 95 L. Ed. 2d 262, 286 (1987). "[T]he sentence...[cannot] be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586,

604, 98 S. Ct. 2954, 57 L. Ed. 2d 973, 990 (1978). In the instant case the knowledge that the Respondent had already received the maximum penalty allowed for his previous conviction would satisfy the jury that the Respondent had been more than adequately punished for his prior acts. To allow the introduction of the conviction without the introduction of the sentence received defies logic. It is tantament to allowing the introduction into evidence of a half truth. Further, to a lay juror it may suggest that the Respondent was not penalized at all for his prior conviction.

CONCLUSION

Petitioner has presented no compelling reason why certiorari should be granted. The Mississippi State Supreme Court has outlined two rights to be afforded the criminally accused in the State of Mississippi. The fact that other states or the federal courts may afford lesser rights is immaterial. The Mississippi Supreme Court must be allowed "the sole and absolute right to make the final interpretation of [its] state constitution..." Penick v. State, 440 So. 2d 547, 551 (Miss. 1983).